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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

BARTLETT-COLLINS COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

AMERICAN FLINT GLASS WORKERS' UNION

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether the Company violated Section 8(a)(1) and (5) of the National Labor Relations Act by bargaining to impasse over whether collective bargaining sessions should be recorded by a certified court reporter with a copy of the transcript thereof for the union at no cost to it after the company in a prior and different proceeding had been found by the Board to have violated Section 8(a)(5) of the Act with respect to the same union and where no record was kept of the prior bargaining.

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NATIONAL LABOR RELATIONS BOARD

and

AMERICAN FLINT GLASS WORKERS' UNION

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

The petitioner, Bartlett-Collins Company,[1] petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit rendered in these proceedings on February 6, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is not yet officially reported. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 237 N.L.R.B. 770.

[1]Bartlett-Collins Company has no parent companies, subsidiaries, or affiliates except for wholly-owned subsidiaries.

JURISDICTION

The judgment and order of the Court of Appeals (App. B, *infra*) was entered February 6, 1981. This petition for certiorari was filed less than 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Company violated Section 8(a)(1) and (5) of the National Labor Relations Act by bargaining to impasse over whether collective bargaining sessions should be recorded by a certified court reporter with a copy of the transcript thereof for the union at no cost to it after the company in a prior and different proceeding had been found by the Board to have violated Section 8(a)(5) of the Act with respect to the same union and where no record was kept of the prior bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (and Supp. V) 151, *et seq*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any and all such activities. . . .
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . . . .

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a) of this title.

. . . . . .

STATEMENT

The Company and the Union met in bargaining on eight occasions between July 18 and December 11, 1974, without a complete agreement being reached. No neutral or impartial record was made of the bargaining sessions. The Union charged, *inter alia*, a Section 8(a)(5) failure to bargain violation. Complaint issued, a nineteen-day hearing ensued, and the Administrative Law Judge's Decision and Order of June 30, 1976, found that the Company had failed to bargain.

On July 29, 1976, the Company and the Union met to bargain pursuant to prior arrangement with an understanding between counsel that the session would be recorded by a court reporter. At the meeting the Union withdrew from its counsel's commitment. Discussion ensued which resulted in the Union agreeing to have that session recorded by a court reporter. No other agreements resulted from that meeting.

On June 13, 1977, the Board adopted the Administrative Law Judge's Decision and Order.

Four days later the Union requested the resumption of collective bargaining negotiations. July 20-22, 1977, were agreed upon for bargaining.

By letter of June 30, 1977, to Union Counsel, the Company noted the discussions of July 29, 1976, concerning recording bargaining sessions by a qualified and competent neutral court reporter, and observed that the Board's Decision and Order of June 13, 1977, made more compelling the need to maintain a record of bargaining. In explicating to the Union its reasons for desiring a record, the Company stated:

> * * * Bartlett-Collins' conduct in bargain (sic) is subject to review by the Board and possibly by the courts to determine whether it has met its bargaining obligation.

A record of bargaining under these circumstances is both desirable and necessary to establish without resort to credibility determinations what was said or done by the parties in bargaining. Further, by maintaining a neutral record at this juncture, the inordinate cost and expense of further extended Board hearings can be either avoided or materially reduced.

We did not ask for or even suggest a record covering our bargaining sessions held prior to the NLRB hearing. That hearing demonstrated to us not only the desirability, but the necessity of such a record, particularly with the bargaining in its present posture.

With the matter in its present posture it is clear that we are to be judged by that which transpires in such a meeting. This is far too important to rest it upon the frailties of memory and the possibility of misunderstanding of what was said or done. A certified court reporter's transcript of our proceedings will protect all participants against being misunderstood and misquoted and it will assist the Board in its difficult and imperfect task of resolving credibility issues. The posture of the parties and of the issues can be delineated clearly should agreement not be reached and should further administrative or court procedure ensue.

Even if Board or Court review of bargaining should not evolve, a record of bargaining can be invaluable in interpreting and applying any agreement reached by the parties.

It might be noted that the Board in its own process recognizes and uses court reporter transcripts to determine possible fact issues.

For the reasons indicated, among others, we feel that our bargaining sessions should be reported by a competent disinterested certified court reporter, and we are making arrangements for reportorial services at our forthcoming bargaining sessions.

We are not suggesting that your client participate in the cost of the preparation of such a transcript. While we

> think it would be appropriate for your client to do so, we are willing to bear the entire expense to the end that we can have an accurate record of all that transpires in the meetings.
>
> It is our intention that the record be binding upon all parties, otherwise it would have no value. As a complete and accurate record of all that transpires, it would not make it possible for the Company or the Union to attempt to depart from what was actually said, either as the result of a misunderstanding or a deliberate departure from the truth. Upon the basis aforesaid, a copy of the transcript will be furnished you. (R. 167-168)

The Union in its letter of July 8, 1977, proposed as an alternative that partisan tape recordings be made.

On July 14, 1977, the Company advised the Union Counsel that it still felt a court reporter record of future bargaining sessions should be kept. Union Counsel replied that an impasse existed and that there was no need to meet on July 20-22.

The Board on a stipulated record found that the Company's bargaining to impasse over reporting bargaining sessions was a *per se* violation of the Act.

The Court of Appeals enforced the Board's order.

It is out of this background that these proceedings emanate.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals is in conflict with *N.L.R.B. v. Southern Transport, Inc.*, 335 F.2d 978 (CA-8, 1966).

Southern Transport establishes that ". . when there has been past dispute and litigation over the positions of the parties at the negotiating meetings, absent a showing of improper purpose, the party willing to bear the expense may condition future negotiations on the presence of a certified

reporter who will keep an accurate record, binding on both parties, which will be made available to both parties" (p. 986).

Moreover, the Court in *Southern Transport* held ". . we can perceive of no sound reason except the cost (which is not at issue herein) . . . that would call for a legal sanction against the use of a verbatim transcript or record" (p. 984).

Both the Board and the Court of Appeals have failed to take into account or give effect to the fact that in the instant case the Company did not seek to record the bargaining sessions until *after* it had bargained extensively, been charged with 8(a)(5) violations, undergone a 19-day trial, and been found by the Board to have violated its bargaining obligation.

CONCLUSION

The petition for a writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[Filed United States Court of Appeals, Tenth Circuit, Jan. 19, 1981, Howard K. Phillips, Clerk]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1090

NATIONAL LABOR RELATIONS BOARD,
Petitioner

and

AMERICAN FLINT GLASS WORKERS UNION,
Intervenor

v.

BARTLETT-COLLINS COMPANY,
Respondent

On Application for Enforcement of an Order of the National Labor Relations Board (No. 16-CA-5809)

Ruah D. Lahey (William Wachter and Joseph P. Norelli, Attorneys, John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, on the brief), National Labor Relations Board, Washington D.C., for Petitioner.

Harold E. Mueller of Mueller & Mueller, Fort Worth, Texas, for Respondent.

John M. Keefer of Chapel, Wilkinson, Riggs, Abney & Keefer, Tulsa, Oklahoma, on the brief for Intervenor.

Before DOYLE, McKAY and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

The American Flint Glass Workers of North America, AFL-CIO, filed an unfair labor practice charge alleging that Bartlett-Collins Company violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5),[1] by insisting upon the use of a court reporter to transcribe negotiations as a precondition to collective bargaining. The National Labor Relations Board found the Company's action a violation of those sections. The Board ordered the Company to cease insisting to impasse on the presence of a court reporter during negotiations and interfering in any like manner with the Union's effort to bargain on behalf of the Company's employees. Pursuant to section 10(e) of the Act, 29 U.S.C. § 160(e), the Board seeks to enforce its order. We grant enforcement.

I.

A.

Background

In June 1974, the Board certified the Union as collective bargaining agent for the Company's employees. After seven bargaining sessions, the Union filed unfair labor practice charges against the Company. The Administrative Law Judge (ALJ) found the Company in violation of section 8(a)(5) of the Act for refusing to bargain in good faith with the Union.

Thereafter, the parties met on July 29, 1976 for further negotiations. At the outset of the meeting, Harold E. Mueller, the Company's attorney and chief negotiator, announced the presence of a court reporter to ensure an accurate transcript.

---

[1]These sections provide:

"(a) It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

". . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

29 U.S.C. § 158(a)(1), (5).

Mueller stated this was necessary in view of the prior unfair labor practice proceeding "in which there was some question about the accuracy of testimony concerning what had transpired at bargaining meetings." Rec., vol. I, at 116. The Union attorney, John M. Keefer, objected to the procedure. He felt a court reporter was unnecessary and costly and that his presence would create a courtroom atmosphere, induce unnecessary speech making, and frustrate negotiations. After considerable wrangling, the Union proposed that the sessions be tape-recorded and later transcribed. The Company continued to insist upon a court reporter. After forty minutes of argument, the Union agreed to the use of the court reporter for that day's meeting, but continued its objection to his presence at future meetings.

B.
Events giving rise to the instant proceeding

No further negotiations were held until after the Board, on June 13, 1977, affirmed the ALJ's decision that the Company had refused to bargain in good faith. *See Bartlett-Collins Co.*, 230 N.L.R.B. 144, 96 L.R.R.M. 1581 (1977). On June 27, 1977, the parties agreed to meet in July for further negotiations. In a June 30 letter, Mueller informed Keefer that the Company intended to have an impartial court reporter transcribe all bargaining sessions, with the record binding on all parties. The Company offered to bear the entire expense. The letter stated that the Board decision, which allegedly rested upon credibility determinations, coupled with the possibility of further review of the Company's bargaining conduct by the Board and the courts, made an accurate record of the negotiations imperative.

In a July 8 letter, Keefer renewed the Union's objections to the Company's insistence on the presence of a court reporter

at negotiating sessions.[2] As an alternative, Keefer proposed that each party be free to record bargaining sessions with its own recording equipment and to transcribe the recordings. The Company rejected this counterproposal and continued to insist on recording of negotiations by a certified court reporter as a prerequisite to further bargaining. The Union filed the instant unfair labor practice charges on July 15, 1977, alleging the Company had violated sections 8(a)(1) and (5) of the Act by insisting to impasse on this matter. The Board agreed. *See Bartlett-Collins Co.*, 237 N.L.R.B. 770, 99 L.R.R.M. 1034 (1978).

On appeal, the Company argues enforcement should be denied because (1) the Board improperly found use of a court reporter during negotiations to be a nonmandatory subject of bargaining, and (2) the Board misconstrued the dispute to be whether a record should be made instead of simply how the record should be made.

II.

A.

The duty to bargain under Borg-Warner

Section 8(a)(5) of the Act states that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5). Section 8(d) defines collective bargaining, in pertinent part, as

> "The performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with

[2]The objections were based on the belief that the presence of a court reporter "at the bargaining table tends to interfere with and unduly impede negotiations and frank discussions between the parties," and would cause several members of the negotiating committee "feelings of discomfort, tension and reluctance to state their views" because they are not accustomed to proceedings where stenographic transcripts are made. Rec., vol. I, at 169.

> respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

Id. § 158(d). In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), the Supreme Court read these two provisions together as "establish[ing] the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .'" The Court held that the "duty is limited to those subjects, and within that area neither party is legally obligated to yield. . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Id.* (citation omitted); *accord*, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

Thus, the Court has divided bargaining proposals into two mutually exclusive categories, mandatory and nonmandatory subjects of bargaining. It is "lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without." *Borg-Warner*, 356 U.S. at 349. The good faith intentions of the insisting party do not affect how the proposal is categorized. The Court specifically stated in *Borg-Warner* that good faith does not entitle a party to insist upon nonmandatory subjects as a precondition to agreement. *See id.*

B.

Application of the Borg-Warner standard

The Board concluded that the demand for the presence of a court reporter to record negotiations is not a mandatory subject of bargaining and that insistence to impasse on this issue is a violation of the Act. *Bartlett-Collins Co.*, 99 L.R.R.M. at

1035-36. The Company attacks this finding as improper. It contends that neither the language of the Act nor policy considerations warrants the Board's interpretation.

In reviewing a Board decision as to whether an issue constitutes a mandatory bargaining subject, we must give "considerable deference" to the Board's judgment. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Congress delegated to the Board "the primary responsibility of marking out the scope of . . . the statutory duty to bargain," *id.* at 496, and the classification of bargaining subjects "'is a matter concerning which the Board has special expertise.'" *Id.* at 495 (quoting *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965)).

Enforcement of Board orders is denied when they have "no reasonable basis in law," are "fundamentally inconsistent with the structure of the Act," or "attempt to usurp major policy decisions properly made by Congress." *Ford Motor Co.*, 441 U.S. at 497. But if the Board's construction "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Id.; accord, Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 176 (3d Cir. 1980).

The Board's decision that the presence of a court reporter during collective bargaining is a nonmandatory subject of bargaining is not vulnerable on any of these grounds. We cannot say the decision was without reasonable basis in law. The Board grounded its conclusion on the reasoning that the issue of a court reporter during negotiations does not

> "fall within 'wages, hours, and other terms and conditions of employment.' Rather these subjects are properly grouped with those topics defined by the Supreme Court as 'other matters' about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours, and other terms and conditions of employment.'"

99 L.R.R.M. at 1036.

While the Company argues that recording of bargaining sessions is not a threshold matter because it is such a part of the fabric of bargaining that it constitutes a term and condition of employment, we disagree. There is "no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees." *Latrobe Steel Co.*, 630 F.2d at 176. It does not "settle an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). Nor does it have a "direct, significant, relationship to wages, hours or terms or conditions of employment. A mere remote or incidental relationship is insufficient." *NLRB v. Massachusetts Nurses Association*, 557 F.2d 894, 898 (1st Cir. 1977). *Accord, NLRB v. Columbus Printing Pressmen & Assistants' Union*, 543 F.2d 1161, 1165-66 (5th Cir. 1976); *Seattle First National Bank v. NLRB*, 444 F.2d 30, 33 (9th Cir. 1971). Although there may exist some preliminary matter that is so inextricably interwoven with the substance of a contract that it constitutes a term or condition of employment, we need not decide that issue. It is clear the presence of a court reporter is not such a matter.

Nor is the Board's ruling fundamentally inconsistent with the structure of the Act or a usurpation of Congressal authority. The purpose of the Act is to foster collective bargaining and the resolution of industrial disputes. *See* 29 U.S.C. § 151; *Fibreboard Paper Products Corp.*, 379 U.S. at 211. It would undermine the policy of the Act to allow negotiations to break down over a threshold procedural issue such as this one. *See Latrobe Steel Corp.*, 630 F.2d at 177. It would create a tool of avoidance for those who wish to impede or vitiate the collective bargaining process. *See St. Louis Typographical Union*, 149 N.L.R.B. 750, 57 L.R.R.M. 1370, 1371 (1964) (Fanning and Brown, concurring). Too often negotiations would flounder before their true inception. *Id.*

The Company argues that no honest bargainer can be disadvantaged by the recording of bargaining sessions. However, the Board and numerous experts in the field of labor

relations believe that the presence of a court reporter "has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." *Bartlett-Collins Co.*, 99 L.R.R.M. 1034, 1036 n. 9. *See also Reed & Prince Manufacturing Co.*, 96 N.L.R.B. 850, 28 L.R.R.M. 1608, 1610 (1951), *enforced on other grounds*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). It may cause parties to talk for the record rather than to advance toward an agreement. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1036 n. 9. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations. *See id.* When a court reporter is demanded over objection, bargaining is likely to begin on a discordant note. *See Reed & Prince Manufacturing Co.*, 28 L.R.R.M. at 1610. The request may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement. *See St. Louis Typographical Union*, 57 L.R.R.M. at 1372 (Fanning and Brown, concurring). In sum, the process of "informed persuasion," *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 490 (1960) (quoting Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1409 (1958)), may be supplanted by the concern for being a careful litigant.

The Company argues that recording bargaining sessions provides important benefits. It speeds bargaining by freeing parties of the burden of note taking. It helps the parties in later construing and applying the final agreement. It is a source for the Board and courts to refer to in the event of litigation. And it allegedly promotes responsibility in bargaining by minimizing idle chatter, filibustering and intemperate behavior. In support of these contentions, the Company notes that all of the Board's formal proceedings are transcribed.

Recording of bargaining sessions does have some positive aspects, but their value is not as great as the Company asserts

when the recording is done over the objection of a party.[3] Making a verbatim transcript does not necessarily facilitate party interpretation of a labor contract and Board resolution of refusal-to-bargain charges. The parties remain "free to discuss points outside of the bargaining room and even while in bargaining sessions they are free to make 'off the record' statements." *NLRB v. Southern Transport, Inc.*, 355 F.2d 978, 984 (8th Cir. 1966). Thus, the parties could continue to haggle over the meaning of the contract. In unfair labor practice proceedings, the Board would still be required to take testimony and make findings of fact as to what occurred when the parties were not speaking on the record. Moreover, the temperate and responsible bargaining the Company asserts would follow from the use of a court reporter may simply reflect a stultified process of negotiations and posturing for the record instead of the spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires.

The Company's analogy to recording of formal Board proceedings is misplaced. The purposes of collective bargaining and those of the judicial process are not the same. Court reporters are an integral part of an adjudicatory hearing because they facilitate the main goal of adjudication, ascertaining the truth. Collective bargaining, on the other hand, "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 488. Agreement is the result of, among other things, the relative economic power of the opposing parties, reason, public opinion, accommodation, and persuasion. *Id.* at 489-90. The pursuit of truth and justice is not always the guiding bea-

[3]Also exaggerated in the Company's argument are the negative implications of the Board's holding. The Company contends that the ultimate effect of the Board's order is that no record of bargaining can be made, not even notes, memoranda, or minutes. The argument is frivolous. The Board limited its ruling to situations in which a party insists to impasse on the presence of a court reporter during negotiations or the use of a device to record those negotiations. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1036.

con in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said in negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of industrial disputes.

The number of cases in which bargaining parties resort to adjudication and in which resolution depends upon an accurate record of the bargaining process is small in comparison to the number of labor contracts negotiated. This fact supports the reasonableness of the Board's conclusion that any advantages from stenographic recording of negotiations are outweighed by the negative effects on the bargaining process of allowing one side to insist upon the presence of a court reporter.

There is not universal acceptance of this position. *See Southern Transport, Inc.*, 355 F.2d at 982-83; Modjeska, *Guess Who's Coming to the Bargaining Table?*, 39 Ohio St. L.J. 415 (1978). But the critical inquiry is whether the Board's conclusion is a reasonable one. Under the deferential review accorded the Board in its "'special function of applying the general provisions of the Act to the complexities of industrial life,'" *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)), all that is necessary is that its construction of what is a mandatory bargaining subject "is not an unreasonable or unprincipled" one. *Ford Motor Co.*, 441 U.S. at 497. The Board has more than met that standard.

The reasonableness of the Board's construction is not altered because it reverses its previous rulings. The Board candidly admits that in prior cases it has, in effect, treated the issue of the presence of a court reporter as a mandatory subject of bargaining. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1035. The Board formerly applied a good faith standard in deciding if a negotiating party's insistence to impasse on the presence of a court reporter at bargaining sessions constitutes an unfair labor practice. *See, e.g., Reed & Prince Manufacturing Co.*, 28 L.R.R.M. 1608 (1951).

It is not improper for the Board to change its position. Rather, it is appropriate for the Board to do so when its accumulated experience demonstrates that change is warranted:

> "The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision-making. 'Cumulative experience begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.'"

NLRB v. Weingarten, Inc., 420 U.S. at 265-66 (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)). As long as the new position is fully explained and is a fair and reasoned one within the scope of the Board's authority, the Board may substitute it for a prior ruling. *See id.* at 267; *Latrobe Steel Co.*, 630 F.2d at 177.

Nor can we agree with the Company that this new ruling violates judicial precedent. The case relied upon by the Company, *NLRB v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966), did speak favorably of stenographic recording of bargaining sessions, but this was in relation to the court's decision that the insisting party's demand had been made in good faith. The Eighth Circuit did not consider whether the matter constituted a mandatory subject of bargaining. The only other circuit court addressing this issue found the use of a stenographer at bargaining sessions to be a nonmandatory subject of bargaining. *See Latrobe Steel Co. v. NLRB*, 630 F.2d 171 (3d Cir. 1980). In fact, the Third Circuit relied upon the Board's decision in this case in so ruling.

III.

The Company asserts that the Board's finding of an unfair labor practice was improper because the issue between the parties was *how* the record of bargaining was to be made, not *whether* one should be made at all. Apparently, the Company is alleging that both parties were insisting on some means of

recording and that the Board unfairly blamed the breakdown in negotiations on the Company.

This argument is without merit. The record makes clear that only the Company insisted on recording the bargaining sessions. In the July 29, 1976 meeting, counsel for the union repeatedly objected to the presence of a court reporter. Finally, after forty minutes of wrangling, he agreed to the use of one for that meeting but he continued his objection regarding future meetings. In setting up the guidelines for the July 1977 meetings, the Company again introduced a demand for stenographic recording of the bargaining sessions. The Union continued its objection to the procedure. It was only "in the spirit of compromise" that the Union suggested electrical recording of the proceeding.

Even if the issue thereby became simply how to record, it was the Company that went to impasse. The Union made a counterproposal to the Company's demand for stenographic recording, but the Company was unwilling to budge, declaring that a court reporter's transcription was a precondition to further bargaining. Under these circumstances, the Board was justified in finding the Company failed to bargain in good faith.

Enforcement of the Board's order is granted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 79-1090

NATIONAL LABOR RELATIONS BOARD,
Petitioner

and

AMERICAN FLINT GLASS WORKERS UNION,
Intervenor

v.

BARTLETT-COLLINS COMPANY,
Respondent

JUDGMENT

Before: DOYLE, McKAY and SEYMOUR, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Bartlett-Collins Company, Sapulpa, Oklahoma, its officers, agents, successors, and assigns on August 23, 1978. The Court heard argument of respective counsel on September 17, 1980, and has considered the briefs and transcript of record filed in this cause. On January 19, 1981, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that the Respondent, Bartlett-Collins Company, Sapulpa, Oklahoma, its officers, agents, successors, and

assigns, abide by and perform the direction of the Board in said order contained.

/s/ Stephanie K. Seymour
Judge, United States Court of
Appeals for the Tenth Circuit

DATED: February 6, 1981

APPENDIX C

Bartlett-Collins Company *and* American Flint Glass Workers of North America, AFL-CIO. Case 16 — CA-7333, 237 NLRB 770

August 23, 1978

DECISION AND ORDER

Upon a charge duly filed on July 15, 1977, by American Flint Glass Workers of North America, AFL-CIO,[1] herein called the Charging Party or the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 16, on August 17, 1977, issued and served on the parties a complaint and notice of hearing. The complaint alleged that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union as the exclusive bargaining representative of all the employees in an appropriate unit by insisting to impasse on a stenographic record of negotiations as a precondition for any further bargaining sessions. On August 29, 1977, Respondent filed an answer denying the commission of unfair labor practices.

Thereafter, on November 10, 14, and 15, 1977, Respondent, the Union, and the General Counsel, respectively, entered into a stipulation of facts in which they jointly moved to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and an Order. The parties waived a hearing before, and the making of findings of fact, conclusions of law, and the issuance of a decision by, an Administrative Law Judge, and stipulated that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the

[1]We note that while the charge filed herein denotes the Charging Party as "American Flint Glass Workers Union of North America, AFL-CIO," the caption appearing on the other formal papers in this proceeding refers to the Charging Party as "American Flint Glass Workers of North America, AFL-CIO." We shall use the latter designation when we refer to the Charging Party by its formal name.

charge, complaint, answer, and the stipulation of facts and exhibits attached thereto constituted the entire record in this proceeding.[2]

On January 12, 1978, the Board approved the stipulation of the parties and ordered the case transferred to the Board, granting permission for the filing of briefs. Thereafter, the General Counsel, Respondent, and the Charging Party filed briefs.

The Board has considered the stipulation, including the exhibits, the briefs, and the entire record in this proceeding, and hereby makes the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent is, and has been at all times material herein, a Delaware corporation, licensed to do business in the State of Oklahoma, with its office and principal place of business in Sapulpa, Oklahoma, where it is engaged in the manufacture and sale of glass tableware and other glass items. During the past 12 months, a representative period, Respondent manufactured, sold, and distributed goods valued in excess of $50,000 directly to customers located outside the State of Oklahoma.

Respondent admits, and we find, that it is, and has been at all times material herein, an employer engaged in commerce

[2]The parties also agreed that the Board's Decision and Order reported at 230 NLRB 144 (1977), involving Respondent and the Charging Party, together with the Administrative Law Judge's Decision, the transcript, the record, and all exhibits, and Respondent's statement of exceptions and objections to the Administrative Law Judge's Decision in that proceeding, were also to be made part of this proceeding, by reference, for all relevant purposes, but that Respondent did not thereby waive application of the provisions of Sec. 10(b) of the National Labor Relations Act, as amended, or its right to object to the admissibility of any such transcript and record. It was also agreed that the incorporation of the transcript and record in the prior proceeding did not constitute acceptance or admission of validity by Respondent of the findings of fact or the conclusions of law of either the Administrative Law Judge or the Board in the prior proceeding.

within the meaning of Section 2(6) and (7) of the Act. We also find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The parties stipulated, and we find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Stipulated Facts*

In an election conducted by the Board in Case 16-RC-6545 on May 31, 1974, a majority of Respondent's employees in an appropriate unit designated the Union as their exclusive collective-bargaining representative.[3] On June 10, 1974, the Regional Director for Region 16 of the National Labor Relations Board certified the Union in that unit. On July 18, 1974, contract negotiations commenced between the Union and Respondent and continued on seven specific dates during the ensuing months. No agreement was reached and, on October 21, 1974, the Union filed a charge in Case 16-CA-5809 alleging, *inter alia*, that Respondent had violated Section 8(a)(5) and (1) of the Act by engaging in bad-faith negotiations in an attempt to undermine the Union's status as the employees' certified representative. Upon complaint and hearing,

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[3]That unit was:

All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at Respondent's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals and other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees, as defined in the Act, as amended.

Administrative Law Judge Morton D. Friedman, on June 30, 1976, issued his Decision in Case 16-CA-5809, finding, *inter alia*, that Respondent had violated Section 8(a)(5) and (1) of the Act, as alleged, by failing and refusing to bargain in good faith with the Union. The Administrative Law Judge found that throughout the course of negotiations Respondent had repeatedly made proposals which it knew could not be accepted by the Union, thereby creating a situation which fell short of the requirements of good-faith collective bargaining demanded by Section 8(a)(5) and (d) of the Act. In reaching his conclusion, the Administrative Law Judge relied primarily on the testimony of union witness Alvarez, whose testimony, he stated, was not materially controverted by any of Respondent's witnesses.

Subsequent to the Administrative Law Judge's Decision, and pursuant to the Union's request, the parties resumed bargaining on July 29, 1976. Present at this meeting, at the request of Respondent's chief negotiator, Harold Mueller, was a certified court reporter who was asked to record and prepare a transcript of that day's negotiations. The Union protested the presence of the reporter and the major part of the meeting thereafter consisted of a heated discussion over the acceptability of a court reporter at future bargaining sessions. Although, pursuant to agreement of the parties, the reporter recorded that day's meeting, the parties failed to resolve the reporter issue as it related to future bargaining sessions and no further meetings between the parties were scheduled or conducted until June 1977.

On June 13, 1977, the Board issued its Decision and Order in Case 16-CA-5809,[4] affirming in full Administrative Law Judge Friedman's finding that Respondent had violated Section 8(a)(5) and (1) of the Act.

Thereafter, on June 17, 1977, counsel for the Union advised counsel for Respondent that the Union desired to resume collective-bargaining sessions. On June 27, 1977, the Union's counsel confirmed the parties' agreement to renew bargaining

[4] *Bartlett-Collins Company*, 230 NLRB 144 (1977).

at meetings to be conducted on July 20, 21, and 22, 1977. Respondent's counsel confirmed this arrangement by letter to the Union's counsel on June 29, 1977. Then, on June 30, 1977, Respondent's counsel wrote the Union's counsel that, in view of the Board's Decision and Order in Case 16-CA-5809 (cited at fn. 4, *supra*), Respondent had concluded that "a record of bargaining under the circumstances is both desirable and necessary to establish without resort to credibility determinations what was said or done by the parties in bargaining." To that end, Respondent indicated that it was making arrangements to secure the services of a court reporter for the forthcoming bargaining sessions. While Respondent's counsel stated that it would be appropriate for the Union to share in the costs of such transcription, it indicated that Respondent was willing to bear the entire expense involved. Respondent contended that, as the Board's recent Decision and Order turned on credibility resolutions, it would protect all parties to have a certified court reporter's transcript of negotiations to eliminate the possibility of potential misunderstanding and/or misquoting of exactly what would transpire during the upcoming bargaining sessions.

By letter dated July 8, 1977, the Union's counsel notified Respondent's counsel of the Union's continued opposition to the presence of a court reporter during contract negotiations. The Union's counsel stressed two considerations: (1) "the presence of a court reporter at the bargaining table tends to interfere with and unduly impede negotiations and frank discussion"; and (2) the members of the Union's bargaining committee were not accustomed to judicial or administrative proceedings where stenographic transcripts were made by a court reporter and, consequently, several members of the committee were reluctant to express their views under such conditions. The Union's counsel expressed the hope that the litigation between the parties had been concluded; that a mutually satisfactory agreement could now be reached; and that Respondent's concern over potential credibility resolutions and further Board proceedings should not present an issue as far as future bargaining sessions were concerned.

However, as an alternative, the Union proposed that each party be permitted to record the bargaining session through the use of its own electronic recording equipment. The Union indicated that it did not wish to meet under Respondent's conditions.

Respondent's counsel responded to the Union's position by letter dated July 14, 1977, stating that Respondent did not agree with the reasons advanced by the Union for its reluctance to bargain in the presence of a court reporter; that the alternative proposal suggested by the Union was unacceptable; and that Respondent remained available for bargaining, provided that a record of the negotiations would be prepared by a certified court reporter. Respondent's counsel also noted that the Union's counsel had informed him that because of Respondent's position, there was no point in meeting and therefore Respondent's counsel was releasing the dates earlier agreed upon for resumed negotiations.

On July 15, 1977, the Union filed a charge in the instant proceeding, alleging that Respondent had violated Section 8(a)(5) of the Act by insisting to impasse upon the presence of a court reporter during collective-bargaining negotiations between the parties.

B. *The Contentions of the Parties*

General Counsel contends that Respondent's current demand for the presence of a court reporter, viewed in the context of Respondent's prior unlawful conduct, is another attempt to frustrate the Union's endeavors to engage in meaningful negotiations. General Counsel asserts that the request was not made in good faith, but rather was an attempt to avoid Respondent's obligation to bargain. The Union agrees with the General Counsel's contention, and argues further that Respondent's insistence to impasse on the presence of a court reporter, which the Union contends is a nonmandatory subject of bargaining, was *per se* a violation of the Act.

Respondent, on the other hand, contends that, in the absence of bad faith, its demand for the presence of a court

reporter was not a violation of the Act. It argues that in the absence of evidence to indicate that its request was made in bad faith the complaint should be dismissed.

Analysis

In *Reed & Prince Manufacturing Company*,[5] the Board held that, in the absence of bad faith, a party does not violate the Act by insisting that a court reporter be present to make verbatim transcript of bargaining sessions. In subsequent decisions, the Board has consistently examined the surrounding circumstances to determine if the insistence either on a court reporter in negotiations or on a device to record those sessions was made in bad faith; i.e., to avoid or frustrate the legal obligation to bargain.[6] Where bad faith has not been shown, the Board has found no violation of the Act in such insistence.[7] In taking this approach, the Board has, in effect, treated the issue of the presence of a court reporter or a recording device at negotiations as a mandatory subject of bargaining. Thus, in *St. Louis Typographical Union No. 8*, *supra*, the Board reasoned:

> It is wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods

[5]96 NLRB 850 (1951), enfd. on other grounds 205 F.2d 131 (C.A. 1, 1953), cert. denied 346 U.S. 887 (1953).

[6]See, e.g., *St. Louis Typographical Union No. 8, affiliated with International Typographical Union, AFL-CIO (Union Employers' Section of the Graphic Arts Association of St. Louis, Inc.)*, 149 NLRB 750 (1964) (then Member Fanning and Member Brown concurring specially. For the reasons expressed in that concurrence and in this Decision, Chairman Fanning now would overrule that decision); and *Southern Transport, Inc.*, 150 NLRB 305 (1964).

[7]See, e.g., *American Ship Building Company*, 226 NLRB 788, 800-901 (1976), enfd. in an unpublished order, Docket 77-1178 (C.A.D.C., April 5, 1978).

> of compromise and accommodation as are used in resolving equally difficult differences relating to substantive terms and conditions of employment. [149 NLRB at 752.]

Upon reexamination of this issue under Supreme Court guidelines, however, we now conclude that the demand for the presence of a court reporter during negotiations as a device to record those negotiations is not a mandatory subject of bargaining, and that either party's insistence to impasse on this issue is, accordingly, a violation of the Act, without regard to whether such insistence was in good or bad faith.

Lawful subjects of bargaining have traditionally been divided into two categories: mandatory and nonmandatory or permissive. In *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*[8] the Supreme Court, in light of the statutory language of Section 8(a)(5) and (d) of the Act, restated the definition of both subjects of bargaining, and the rights and obligations respective to each:

> Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment . . ." The duty is limited to those subjects and within that area neither party is legally obligated to yield . . . As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

It is our view that the issue of the presence of a court reporter during negotiations or, in the alternative, the issue of the use of a device to record those negotiations does not fall within "wages, hours, and other terms and conditions of employment." Rather these subjects are properly grouped with those topics defined by the Supreme Court as "other matters" about which the parties may lawfully bargain, if they so desire, but

[8] 356 U.S. 342, 349 (1958).

over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue.[9]

In view of the above, we find that Respondent's demand for the presence of a court reporter during negotiations should be accorded the status and attendant characteristics of a nonmandatory subject of bargaining. Accordingly, we conclude that Respondent, by insisting to impasse on the presence of a court reporter during contract negotiations as a precondition to such negotiations, violated Section 8(a)(5) and (1) of the Act. Having found that the subject matter here involved is not a mandatory subject of bargaining, and that Respondent's insistence on such subject therefore violated Section 8(a)(5), it is irrelevant whether Respondent's insistence was in good

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[9]Indeed, we note that many experts in the field of labor relations have expressed their opinion that the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining. In "Techniques of Mediation in Labor Disputes," (Oceana Publications, N.Y., 1971), p. 63, author Walter Maggiolo states that:

> Experience has taught that the presence of a stenographer or tape recorder does inhibit free collective bargaining. Both sides talk for the record and not for the purpose of advancing negotiations toward eventual settlement. Each becomes overconscious of the recording of his remarks. The ease of expression so necessary to proper exposition of problems is hampered. The discussion generally becomes stultified.

And, as noted in "Practice of Collective Bargaining," by Beal, Wickersham and Kienast (Richard D. Irwin, Inc., Ill., 1976), p. 217, the presence of a stenographer tends to formalize proceedings and reduces the spontaneity and flexibility that are often manifested in successful bargaining.

or bad faith. Prior Board decisions indicating to the contrary are hereby overruled.[10]

CONCLUSIONS OF LAW

1. Bartlett-Collins Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. American Flint Glass Workers of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times relevant herein, American Flint Glass Workers of North America, AFL-CIO, has been the exclusive representative of all the employees in the appropriate unit set forth below for purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at the Employer's Sapulpa, Oklahoma, plant; excluding all other

[10]Respondent contends that the Union was equally responsible for the parties reaching impasse on this issue. We disagree. While the Union expressed the opinion that the presence of a court reporter would unduly inhibit frank discussion, it demonstrated a willingness to compromise on the issue by proposing that both parties be permitted to utilize electronic recording equipment to transcribe the various negotiation sessions. It did not insist on that condition, however, and was willing to proceed without any recording being done. It was Respondent, however, which remained adamant in its refusal to engage in negotiations in the absence of a court reporter, a position which foreclosed the possibility of discussion on any topic, including that of the court reporter. In these circumstances, we find that Respondent's conduct alone was responsible for the bargaining impasse which the parties reached.

employees including office clericals, other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees as defined the Act, as amended.

4. Since on or about June 30, 1977, and continuing to date, Respondent, by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions, we will order that Respondent cease and desist from engaging in such conduct and, upon request, bargain collectively in good faith with American Flint Glass Workers of North America, AFL-CIO, and its designated agents at times and places mutually convenient concerning wages, rates of pay, hours of employment, and other terms and conditions of employment, as indicated in our Order below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bartlett-Collins Company, Sapulpa, Oklahoma, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interfering with the efforts of the Union to bargain on behalf of the employees in the unit described below, by insist-

ing to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at the Employer's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals and other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees as defined in the Act, as amended.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees in the above-described unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the Union and its designated agents at mutually convenient times and places with respect to wages, rates of pay, hours, and other terms and conditions of employment and, if agreement is reached, embody it in a signed contract.

(b) Post at its place of business in Sapulpa, Oklahoma, copies of the attached notice marked "Appendix."[11] Copies of said notice on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt

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[11]In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interfere with the efforts of the Union to bargain on behalf of the unit employees by insisting to impasse on the presence of a court reporter to make a stenographic record of negotiations as a precondition for any further bargaining sessions.

WE WILL NOT in any like or related manner interfere with the efforts of the Union to bargain collectively on behalf of our employees so represented.

WE WILL, upon request, meet and bargain collectively in good faith at mutually convenient times and places with American Flint Glass Workers of North America, AFL-CIO, and its designated agents, in the unit described below, with respect to wages, rates of pay, hours, and other terms and conditions of employment and, if agreement is reached, WE WILL embody it in a signed contract. The appropriate unit is:

> All senior machine operators, press machine operators, press machine helpers, pace [paste] machine operators, pace [paste] machine helpers, tank men, tank men trainees, turnouts, floor boys, production clerks, oilers, repairmen, senior mechanics, mechanics-repairmen, mechanics-welders, machinists, machinist learners, and other employees regularly employed in the forming department (also known as the Front End) at the

Employer's Sapulpa, Oklahoma, plant; excluding all other employees including office clericals, and other plant production and maintenance employees, mold makers, professional and technical employees, watchmen, guards, head tank men, and other supervisory employees as defined in the Act, as amended.

BARTLETT-COLLINS COMPANY

No. 80-1662

MAY 28 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARTLETT-COLLINS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act by insisting to impasse upon the employment of a court reporter to transcribe collective bargaining negotiations as a precondition to entering into such negotiations with the union.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 639 F.2d 652. The Board's decision and order (Pet. App. A-15 to A-28) is reported at 237 N.L.R.B. 770.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1981 (Pet. App. A-13 to A-14). The petition for a writ of certiorari was filed on April 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, set forth in the petition (at 2-3), Section 8(d), 29 U.S.C. 158(d), is also relevant. That Section provides in part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

STATEMENT

1. In 1974, the Board certified the American Flint Glass Workers of North America, AFL-CIO, as the collective bargaining representative of petitioner's employees. After seven bargaining sessions, the Union filed charges with the Board and a complaint issued, alleging, *inter alia*, that petitioner had violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), by bargaining in bad faith (Pet. App. A-17). On June 30, 1976, an Administrative Law Judge ("ALJ") issued a decision finding, *inter alia*, that petitioner in fact had conducted negotiations in a manner that fell short of the Act's requirement of good faith bargaining. In making his findings of fact, the ALJ primarily relied on the testimony of a Union negotiator that was not materially controverted by petitioner's witnesses (Pet. App. A-17 to A-18).

The parties resumed negotiations on July 29, 1976. Petitioner's chief negotiator, Harold Mueller, had arranged for a certified court reporter to make a verbatim transcript of the bargaining session (Pet. App. A-19). Mueller asserted that, in view of the prior Board proceeding " 'in which there was some question about the accuracy of testimony concerning what had transpired at bargaining meetings' " (Pet. App. A-3), there was a need to maintain an official transcript of all bargaining sessions. The Union's negotiator, John Keefer, objected to the presence of a court reporter on the grounds, *inter alia*, that such a procedure would create a courtroom atmosphere, encourage speech making for the record, and thereby frustrate meaningful negotiations. After extended debate, the Union agreed to the presence of the reporter for that day's meeting only, but refused to agree to such a procedure for future meetings (Pet. App. A-3, A-18).

After the July 29, 1976 meeting, petitioner filed exceptions to the ALJ's decision of June 30, 1976, and no further sessions were held. On June 13, 1977, the Board issued its decision affirming the ALJ's decision in relevant part. See *Bartlett-Collins Co.*, 230 N.L.R.B. 144 (1977). Thereafter, the parties arranged bargaining sessions for July 20, 21 and 22, 1977 (Pet. App. A-18 to A-19). Then, by letter of June 30, 1977, petitioner reasserted its demand that the sessions be transcribed by a certified court reporter. By letter of July 8, 1977, the Union renewed its objections but proposed, by way of compromise, that each party make its own electronic recording of the bargaining sessions (Pet. App. A-3 to A-4, A-19 to A-20). Petitioner rejected the Union's alternative proposal and adhered to its position that it would not

meet without a certified court reporter (Pet. App. A-4, A-20). The Union thereupon filed the instant unfair labor practice charges with the Board (Pet. App. A-20).

2. Overruling prior Board decisions holding that, in the absence of bad faith, a party lawfully could demand that negotiations be transcribed by a court reporter, the Board found that such a demand does not constitute a mandatory subject of bargaining and that, therefore, petitioner's insistence upon the presence of a court reporter violated Section 8(a)(5) of the Act irrespective of petitioner's good or bad faith (Pet. App. A-21 to A-24). The Board noted that it had formulated its former position prior to the decision in *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), in which the Court distinguished between mandatory and nonmandatory subjects of bargaining and agreed with the Board that an employer's insistence to impasse upon a nonmandatory bargaining subject—namely, one that "settles no term or condition of employment" (*id.* at 350)—violates Section 8(a)(5) of the Act even though such insistence may be in good faith. Reexamining the stenographic transcription issue in light of *Borg-Warner*, the Board reasoned as follows (Pet. App. A-23; footnote omitted):

> The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to

> permit a party to stifle negotiations in their inception over such a threshold issue.

In support of its decision, the Board relied (Pet. App. A-23 n.9) on the opinion of experts in the field of labor relations that "the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining."

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-1 to A-12). The court noted (Pet. App. A-5) the mandatory/nonmandatory distinction drawn by this Court in *Borg-Warner*, *supra*, and concluded that the Board had acted reasonably in determining that "[t]here is 'no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees' " (Pet. App. A-7, quoting *Latrobe Steel Co.* v. *NLRB*, 630 F.2d 171, 176 (3d Cir. 1980), petition for cert. pending, No. 80-1824 (filed May 1, 1981)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review accordingly is unwarranted.

This Court has long recognized that, read together, Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. 158(a)(5) and 158(d), "establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment. . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. * * * As to other matters, however, each party is free to bargain or not to bar-

gain * * * ." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210 (1964), quoting *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Lawful bargaining subjects thus fall into two mutually exclusive categories—mandatory and nonmandatory subjects of bargaining—and, even in the absence of bad faith, a party violates Section 8(a)(5) of the Act by insisting to the point of impasse that the other party accede to a nonmandatory demand. *Borg-Warner*, *supra*, 356 U.S. at 348-350.

In determining what subjects are mandatory subjects of bargaining, this Court has recognized both the clear congressional intent to limit the scope of mandatory bargaining to "issues that settle an aspect of the relationship between the employer and employees" (*Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971)), and that the " 'classification of bargaining subjects as "terms [and] conditions of employment" is a matter concerning which the Board has special expertise' " (*id.* at 182, quoting *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965)). Accordingly, the Board's "judgment as to what is a mandatory bargaining subject is entitled to considerable deference" and should be "accepted and enforced" unless "unreasonable or unprincipled." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979).

The Board's holding that the issue of whether bargaining sessions are transcribed does not fall within the phrase " 'wages, hours, and other terms and conditions of employment,' " but rather is a "threshold matter, preliminary and subordinate to substantive negotiations" (Pet. App. A-23), is a reasonable and principled construction of the Act. Because bargaining over the court reporter issue "settles no term or con-

dition of employment" (*Borg-Warner, supra,* 356 U.S. at 350), the Board properly could conclude that, by conditioning any bargaining about substantive matters upon the Union's agreement on this nonmandatory issue, petitioner failed to meet its bargaining obligations under Sections 8(d) and 8(a)(5) of the Act. See *Borg-Warner, supra,* 356 U.S. at 349.

Moreover, the Board's decision to treat the issue of transcribing bargaining sessions like other nonmandatory or permissive subjects of bargaining is in harmony with actual industrial practice and with the opinion of experts in the field of labor relations that the practice of recording bargaining sessions interferes with the collective bargaining process and should be used only with the voluntary consent of both parties.[1] This Court has recognized that, "[w]hile not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining." *Fibreboard, supra,* 379 U.S. at 211 (footnote omitted).

Finally, the decision below is consistent with the decision of the only other court of appeals that has addressed this issue. In *Latrobe Steel Co.* v.

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[1] See the authorities cited by the Board at footnote 9 of its decision and order (Pet. App. A-23). See also N. Chamberlain, *Collective Bargaining Procedures* 62 (1944); C. Kerr & R. Randall, *Crown Zellerbach and the Pacific Coast Pulp and Paper Industry: A Case Study* 48-49 (1948); B. Morse, *How to Negotiate the Labor Agreement* 44 (5th ed. 1974); National Industrial Conference Board, Inc., *Conference Board Reports: Preparing for Collective Bargaining* 40 (1959); S. Slichter, J. Healy & E. Livernash, *The Impact of Collective Bargaining on Management* 938 (1960); R. Smyth & M. Murphy, *Bargaining with Organized Labor* 47 (1948).

NLRB, 630 F.2d 171, 176 (1980), petition for cert. pending, No. 80-1824 (filed May 1, 1981), the Third Circuit held that, because there was "no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees," the Board's treatment of that issue as a nonmandatory subject of bargaining was a "reasonable interpretation of the Act."

Contrary to petitioner's contention (Pet. 5-6), there is no conflict between these decisions and the Eighth Circuit's holding in *NLRB* v. *Southern Transport, Inc.*, 355 F.2d 978 (1966). Both the court below (Pet. App. A-11) and the Third Circuit in *Latrobe Steel, supra*, 630 F.2d at 177, correctly distinguished *Southern Transport* on the ground that the court in that case focused on the question whether a demand for a court reporter was made in good faith, and did not consider whether the matter was a mandatory subject of bargaining. Indeed, in *Southern Transport*, the court described the case before it in the following terms (355 F.2d at 982, 981):

> Neither the Board nor the Courts have squarely ruled on the issue of whether a party could lawfully require, as a precondition to negotiations, that a reporter be present to make a transcript of the proceedings which transcript would be binding on the parties. The Court recognizes the basis of this unfair labor practice charge is concerned with the motive with which Respondent is attempting to conduct its negotiations.
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> The Board decided that Respondent's demand was made in bad faith, but it is our belief that

there is no substantial evidence in the record upon which this finding could be based * * *.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] As the court below properly noted (Pet. App. A-11), the Eighth Circuit's favorable comments concerning the stenographic recording of bargaining sessions were made "in relation to the court's decision that the insisting party's demand had been made in good faith. The Eighth Circuit did not consider whether the matter constituted a mandatory subject of bargaining."

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